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4 **UNITED STATES DISTRICT COURT**
5 **NORTHERN DISTRICT OF CALIFORNIA**
6 **SAN JOSE DIVISION**
7

8 UNITED STATES,

9 Plaintiff,

10 vs.

11 HAO ZHANG, ET AL.,

12 Defendants.
13

Case No.: CR 15-00106 EJD

~~[PROPOSED]~~ **SUPPLEMENTAL RELEASE
ORDER**

14 **INTRODUCTION**

15 The Court issues this Order to supplement the release order set forth in the attached “Order
16 Setting Conditions of Release and Bond Form,” which is a standard one-page form that is used in the
17 Northern District of California. The issue is whether the immigration detainer lodged against
18 Defendant Hao Zhang is relevant to risk of flight.
19

20 **STATEMENT OF FACTS**

21 Mr. Zhang is a resident and citizen of the People’s Republic of China. An immigration
22 detainer has been lodged against him by the Department of Homeland Security (DHS).
23

24 **ANALYSIS**

25 **I. LEGAL STANDARDS**

26 Pursuant to the Bail Reform Act, 18 U.S.C. § 3141, *et seq.*, the court must release a defendant
27 facing trial under the least restrictive condition or combination of conditions that will reasonably
28 assure the appearance of the defendant as required and the safety of the community. “Only in rare

1 circumstances should release be denied, and doubts regarding the propriety of release should be
2 resolved in the defendant's favor." *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). The
3 court must order a defendant detained only if, "after a hearing pursuant to the provisions of
4 subsection (f) [of section 3142]," the court finds that conditions cannot be fashioned to assure the
5 defendant's appearance in court or the safety of the community or another person. *See* 18 U.S.C. §
6 3142(e)(1).
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8 Under section 3142(f), the court "shall hold" a hearing only in certain cases, including on the
9 government's motion in cases involving a serious risk of flight. *See* 18 U.S.C. § 3142(f)(2)(A). At
10 the hearing, the court determines whether any conditions in section 3142(c) will reasonably assure the
11 defendant's appearance and the safety of the community or another person. *See id.* § 3142(f). Clear
12 and convincing evidence must support a finding that no conditions of release will reasonably assure
13 the safety of the community or another person, and a preponderance of the evidence must establish
14 that conditions will not reasonably assure a defendant's appearance. *See United States v. Motamedi*,
15 767 F.2d 1403, 1406 (9th Cir. 1985).
16

17 In evaluating whether conditions can be fashioned under section 3142(c) to reasonably assure
18 the defendant's appearance and the safety of the community or another person, a court shall consider
19 the factors in section 3142(g), including (1) the nature and circumstances of the offense, including
20 whether the offense is one of certain enumerated crimes; (2) the weight of the evidence; (3) the
21 history and characteristics of the defendant (including his job, financial resources, family ties,
22 community ties, substance abuse history, physical and mental condition, character, criminal history,
23 past conduct, trace record in appearing in court, and whether at the time of arrest of the defendant
24 was on supervision for parole, probation, or other release in a pending case); and (4) the nature and
25 seriousness of the danger to any person or the community posed by the defendant's release.
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II. APPLICATION

Following a hearing over several court sessions under 18 U.S.C. § 3142(f) in this case, and considering the factors set forth in section 3142(g), the Court has found by a preponderance of evidence that a combination of conditions will reasonably assure Mr. Zhang's appearance in this case. (Public safety is not contested by the government, and the court does not find that releasing Mr. Zhang would pose any risk of danger to the community or any person.)

An issue in the Court's consideration is whether Mr. Zhang's immigration status raises a concern about flight risk. It does. *See, e.g., United States v. Xulum*, 84 F.3d 441, 443-44 (D.C. Cir. 1996) (finding that a detainer and the risk of removal are relevant to assessing flight risk but holding that a DHS detainer did not by itself justify detention). However, the Court is satisfied that the conditions set forth in this Order address that risk.

Notably, as to the detainer, DHS "has itself addressed any concerns regarding [Mr. Zhang's] . . . risk of flight by lodging a detainer . . ., which permits his retention for 48 hours after he is otherwise ordered released, and at that point, the agency may opt to take [him] into custody pending deportation proceedings." *Ibid.* Moreover, as past cases demonstrate, defendants are regularly allowed bail in immigration proceedings. If DHS elects to initiate removal proceedings against Mr. Zhang and he is allowed bail in that case, the conditions set forth by this Court address any concern about flight risk. On the other hand, if Mr. Zhang is not allowed bail in the administrative removal proceeding within ninety (90) days of being taken into DHS custody, defense counsel shall immediately notify government counsel. In that event, upon submission of a proposed order by the government or defense counsel, this Court will revoke the bond, release the sureties from their obligations, and issue an appropriate writ and arrest warrant directing the United States Marshal to take the defendant back into custody.

1 By the same token, if an immigration court orders the defendant deported or removed from
2 the United States, or if there is any other event in the administrative proceeding that might result in
3 the defendant's removal from the United States, defense counsel shall immediately notify
4 government counsel. In that event, upon submission of a proposed order by the government or
5 defense counsel, this Court will revoke the bond, release the sureties from their obligations, and issue
6 an appropriate writ and arrest warrant directing the United States Marshal to take the defendant back
7 into custody.
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9 CONCLUSION ON BAIL DETERMINATION

10 In sum, the Court finds that the release conditions it has set reasonably assure Mr. Zhang's
11 appearance, and orders him released pursuant to the conditions in the attached "Order Setting
12 Conditions of Release and Appearance Bond," as supplemented by this Order. The Court also
13 imposes the conditions contained in this supplemental order pursuant to section 3142(c)(1)(B)(xiv)'s
14 catch-all provision.
15

16 NOTICE TO IMMIGRATION AUTHORITIES

17 The government and defense counsel are directed to provide a copy of this order and the
18 indictment to immigration authorities. The government may satisfy this obligation through the
19 Immigration and Customs Enforcement (ICE) agent (or other ICE liaison) who lodged the detainer
20 after the indictment was returned, and the defense may do so through any pending immigration
21 proceedings, should they be initiated.
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1 The immigration authorities are advised that there is a pending federal criminal indictment in
2 this case, and they must notify the government of any order or warrant of removal before it is
3 executed. Mr. Zhang shall not be removed from the United States while there is a pending criminal
4 case.

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6 IT IS SO ORDERED.

7 Dated: July 8, 2015

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9 NATHANAEL COUSINS
10 United States Magistrate Judge
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